Supreme Court, U.S.
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No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 2006

GREGSON JOSEPH,

Petitioner

v.

TOMMY G. THOMPSON, SECRETARY,
DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

ON PETITION FOR WRIT OF CERTIOIRARI
TO THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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December 12, 2006

QUESTIONS PRESENTED FOR REVIEW

1) Has *Plessy v. Ferguson* and the legal doctrine of "separate, but equal" been **"de facto"** reinstated by United States Court of Appeals for the Second Circuit and, if so, does the United States Supreme Court agree with this and now considers *Plessy v. Ferguson* to be good law?

2) Is the recent Supreme Court decision in *Burlington Northern v. White* applicable to African Americans, in particular African American males, who file Title VII retaliation claims?

3) Do federal appellate courts enjoy the right to unilaterally and by judicial decree waive the Title VII Retaliation claims of African American plaintiffs-appellants, in particular African American male plaintiffs-appellants, even when the defendant-appellee never raised any arguments that plaintiff-appellant "waived" his Title VII retaliation claims? Additionally, will African American non-lawyer Title VII plaintiffs-appellants, in particular African American males, when proceeding pro se be held to the legal standards of law school trained and bar certified attorneys?

4) Do federal appellate courts enjoy the right to **not** grant African Americans, in particular African American males, de novo review of federal district courts' summary judgment dismissals of their Title VII civil actions?

5) The instant case raises a question that has never been addressed by the Supreme Court. The question is this: For an employer to place a protected class employee who has filed a Title VII action (or EEO complaint) on an extended paid "administrative leave" – pending the outcome of any administrative or other investigation – can this also be an act of discrimination/retaliation, in particular if the employee is still kept in such a status for months after the investigation has been

concluded and the allegations against the employee have been dismissed or not substantiated?

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JURISDICTION

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e to 20003-17, confers federal court jurisdiction for Title VII actions brought by protected class federal employees against their employer. Since the United States Court of Appeals for the Second Circuit has ruled against appellant-petitioner and has upheld the Eastern District of New York summary judgment dismissal of appellant-petitioner's Title VII employment discrimination/retaliation civil action, the Supreme Court is now the proper jurisdiction for appellant-petitioner's appeal.

On March 23, 2005, the United States District Court of Appeals for the Second Circuit (Judge David Trager) granted summary judgment to the appellee-respondent. At the district court level, appellant-petitioner was represented pro bono by counsel appointed by the district court.

Appellant-Petitioner, proceeding pro-se, appealed Judge Trager's decision to the Second Circuit. On April 21, 2006, four days after the Supreme Court held oral argument in *Burlington Northern*, the Second Circuit held oral argument in *Joseph v. Leavitt*. The three judge panel consisted of the then Chief Justice of the Second Circuit, the now current Chief Justice of the Second Circuit, and a former Chief Justice of the Ninth Circuit, sitting by designation. It was the Panel of the Appellate Chiefs. In retrospect, the panel was sort of a mini-Supreme Court. Appellant-Petitioner argued his case before the Panel of Chiefs pro-se.

On September 13, 2006, the Second Circuit upheld the district court decision. Appellant-Petitioner now turns to the Supreme Court of the land in an attempt to obtain justice. Simple justice.

STATEMENT OF THE CASE

A. Work Assignments and the Tacking of African-American Employees

On September 9, 1989 – a few days before petitioner began his employment with the US Food and Drug Administration ("the FDA") – Justice Thurgood Marshall gave a speech in Bolton Landing, New York to a conference of Second Circuit Appellate Court judges in which he spoke about recent Supreme Court decisions. In the speech, he stated:

> **"It is difficult to characterize last term's [Supreme Court] decisions as the product of anything other than a deliberate retrenchment of the civil rights agenda. We could sweep it under the rug and hide it, but I'm not going to do it. We have come full circle [since Brown]. We are back where we started [back to Plessy]."**

(The above passage is a taken from page # 366 from the book, Thurgood Marshall: Warrior at the Bar, Rebel on the Bench by Michael D. Davis & Hunter R. Clark)

Simply stated, at its core, this case is about whether or not Plessy v. Ferguson has been "de facto" reinstated and whether or not Burlington Northern will be applied to African Americans, in particular African American males.

Petitioner has laid out the facts of his case in detail in the following documents: 1) Plaintiff-Appellant Appellate Brief to the Second Circuit, 2) Plaintiff-Appellant Reply Brief to the Second Circuit, and 3) Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment. Although petitioner was unable to include these documents in the accompanying appendix, due to time restraints and the need to format them to fit the requirements of this Court, petitioner

prays that before a decision is made on whether or not to grant certiorari that the Court either grant petitioner leave to submit these documents or the Court obtains and reads these documents before making a final decision on certiorari.

Petitioner, however, will briefly summarize his case. In 1989, petitioner was hired by the FDA New York Domestic Investigations Branch as a Consumer Safety Officer ("CSO," also termed more simply "FDA Investigator"). FDA Investigators do not have any police powers and do not carry firearms. FDA Investigators in the Domestic Investigations Branches nationwide conduct inspections of: food manufacturers, cosmetic manufacturers, blood banks, medical device manufacturers, pharmaceutical manufacturers (OTC and prescription), and bio-medical research facilities and clinical trials (in FDA terms this is called BIMO inspections). Each of these types of inspections is called a program area.

Prior to around 1995, in the New York District (as was the case in every other FDA district nationwide) there were several CSO Specialists ("Investigators") in each program area. This means that there were more than one Food Specialist, more than one Pharmaceutical Specialist, more than one BIMO Specialist, and more than one Medical Device Specialist. Within the FDA, a Specialist CSO position has a unique Position Description ("PD"). The PD specifies that the Investigator/CSO has a high level of knowledge, skills and experience in conducting that particular type of inspection (i.e. pharmaceutical, medical device, etc.) Specialist CSO positions within the FDA are competitive and FDA CSOs/Investigators compete nationwide for CSO Specialist positions.

Prior to around 1995, the Specialist CSO position was at the GS-12 level, and, to repeat, there were more than one Specialist CSO in each program area in the New District Investigations Branch, as well as all other FDA District Investigations Branches nationwide. Because CSO

Specialist position was at the GS-12 level, the journeyman CSO level, prior to around 1995, was at the GS-11 grade level.

Around 1995, the FDA did a nationwide upgrade of the CSO/Investigator position raising the journeyman level from the GS-11 to the GS-12 grade level. The CSO/Investigator Specialist position was now raised to the GS-13 grade level. In the New York District Domestic Investigations Branch, a single GS-13 CSO/Investigator Specialists position was opened in each program area. Hence, the New York District Investigations Branch went from having multiple CSO/Investigator Specialists in each program area to a single CSO/Investigator Specialist for each program area.

Prior to 1996, petitioner had filed two EEO complaints and had an active Title VII civil action before the E.D.N.Y., with the main claim being that African American CSOs/Investigators were not given the opportunity to conduct pharmaceutical inspections and BIMO inspections on a routine and regular basis. This resulted in African American CSOs/Investigators, including petitioner – **due not to any lack of "qualifications," but due to the lack of equal opportunity** – not being able to legitimately compete with their similarly-situated white colleagues for CSO/Investigator Specialists positions.

Even though prior to 1995 the New York District Investigations Branch had multiple GS-12 CSO Specialists, there was not a single African American Pharmaceutical Specialist and not a single African American BIMO Specialist. However, in the medical device program area there were at least two African American CSOs who were Medical Device Specialists. The reason for this was simple. African American CSOs, beginning around 1992, were given the opportunity to conduct medical device inspections on a routine and regular

basis, and hence were able to legitimately and successfully compete for Medical Device Specialist positions. African American CSOs, however, were given no such similar opportunity with regards to pharmaceutical inspections and BIMO inspections.

Hence, as was noted in petitioner's lower courts briefs (and which the defendant-respondent acknowledged), in the history of the New York District, there has never been a single African American Pharmaceutical Specialist or a single African American BIMO Specialist.
Indeed, in the entire history of the FDA, there has been only a single African American Pharmaceutical Specialist and no African American BIMO Specialist. The lone Pharmaceutical Specialist worked in the FDA New Jersey District and he was selected for this position only after petitioner had filed his Title VII civil action.

The district court and the Second Circuit chose to ignore or minimize the following:

a) the significance of the composition of the CSO Specialist positions in the New York District prior to 1995. There were African American CSO Specialists in other program areas, but none in the Pharmaceutical or BIMO program area.

b) the fact that petitioner, like virtually all other African American CSOs in the New York District, was denied the opportunity to conduct pharmaceutical and BIMO inspections on a routine and regular basis. As in Louisiana in 1890 with the "Separate Car Act," it is as if FDA, by pattern and practice, had created what can be called the "Separate Inspection Program Area Act."

c) the fact that petitioner in his entire FDA career was given the opportunity to conduct only one BIMO inspection.

d) the pharmaceutical inspections that petitioner were given the opportunity to conduct were overwhelmingly of OTC manufacturer and were of the most basic and rudimentary sort. In short, they were primarily a "look see" of the pharmaceutical program area.

The lower courts chose instead to focus on the fact that there was - at present and since 1995 - just a single Specialist position in the pharmaceutical program area and the BIMO program area, and that none of these two Specialist positions had become vacant since 1995, as the two white CSOs who were promoted to these positions in 1995 still remained in them. They then proceeded to rule that petitioner had suffered no "adverse employment action" because, simply put, there had been no vacancy in the New York District for a Pharmaceutical Specialist or a BIMO Specialist.

The FDA, via the nationwide CSO upgrade in 1995, diluted the statistical evidence and created a "masking effect." The nationwide upgrade of the CSO Specialist position significantly reduced the number of CSO Specialists in the New York District and the FDA as a whole. This made the pool (sample size) much smaller and the statistics not as compelling. The respondent then urged the lower courts to put on blinders and not scrutinize closely the state of affairs prior to 1995, and the lower courts obliged. Hence, the complete equations would not be examined, which are:

1) "Of x number of African American Specialists in the New York District, 0 (none) were Pharmaceutical Specialist and 0 (none) were BIMO Specialists."

2) "Of x number of African American Specialists in the FDA, 1 was a Pharmaceutical Specialist and 0 (none) were BIMO Specialists."

Petitioner never argued before the lower courts and he certainly does not argue here for any "quota system."

Petitioner has argued only for equal opportunity, a level playing field and a genuine meritocracy.

The statistical evidence was presented to indicate and to go to establish that the playing field was not level, there was a lack of equal opportunity and that no genuine meritocracy was in place. The lower courts by narrowing petitioner's claim to a claim of "promotion to a Pharmaceutical or BIMO Specialist position" created a judicial straw man. Petitioner argued in all of his lower court briefs that before one could get to the issue of promotion one had to address the issue of work assignments.

> **Equitable work assignment is the foundational building block that allows African Americans to be able to legitimately compete with their similarly-situated colleagues.**

Prior to March 1996 and after 1995, the FDA New York District did not afford petitioner the opportunity to conduct pharmaceutical inspections or BIMO inspections on a routine and regular basis, and hence petitioner could not legitimately compete for either of these Specialist positions prior to 1995, in 1995 or after 1995. The lower courts however would give short thrift to this crucial issue.

In their rulings the lower courts, essentially, stated that medical device inspections – the program area of most of petitioner's work assignments – is no different from the pharmaceutical or BIMO inspection areas in terms of pay, benefits or prestige. (Again, BIMO refers to "clinical trial inspections.") Hence, it would not be unlawful for the FDA to, essentially, track African American CSOs in the medical device area and to, essentially, exclude us from the pharmaceutical program area or the BIMO program area. This is the essence of *Plessy v. Ferguson*, with the small

caveat that this time around things have to be somewhat more equal.

The Second Circuit erroneously concluded that petitioner, at oral argument, made the argument "that African American were systematically excluded from clinical trial inspections," but that petitioner "waived" this argument as it was "not raised in appellant's opening brief" and was "not argued in the district court." This is simply erroneous as this argument was made in: 1) petitioner's original complaint; 2) his amended complaint; 3) his brief in opposition to the defendant's motion for summary judgment; and 4) in his opening brief to the Second Circuit. Pro se petitioner never "waived" this argument. It was the Second Circuit panel which unilaterally and by judicial decree "waived" this argument, and thereby provided an affirmative helping hand to the appellee-respondent – an entity fully stacked with Harvard and Yale trained attorneys.

In their ruling, the Second Circuit panel also stated that petitioner raised another issue that petitioner had not raised before the district court, namely that "that the FDA was allegedly testing Fenfluramine on minority young people in order to test their propensity for violence." As the oral argument transcript will show, petitioner did not state that the FDA was allegedly "testing Fenfluramine on minority young people in order to test their propensity for violence." What petitioner did state at oral argument is that the FDA had **"approved"** a clinical trial in which only African American and Latino teenage boys – **all of whom had exhibited no violent or criminal behavior** – were being administered Fenfluramine, a drug combination found to cause heart problems. This was not a new argument being raised by petitioner. Petitioner stated this to show the public policy implication and possible harm that can come about when African Americans or any other "stakeholder" is excluded from

the clinical trial review, approval and inspection process. An employee of color would, arguably, be more likely to see that something was amiss and may have raised a cautionary red flag to the agency.

In short, as the Supreme Court has recognized in the Michigan law school case, genuine and meaningful diversity does bring real value to public and governmental institutions. It makes them better and it makes our country stronger. In the workplace, genuine and meaningful diversity comes about when an institution provides equal opportunity, a level playing field and a genuine meritocracy for all.

B. Administrative Leave as an Act of Retaliation

On March 20, 2002, based on the false allegations of Ms. Julie Douglas, who had been petitioner's girlfriend living with petitioner in petitioner's apartment, petitioner was arrested and charged with assault. Ms. Douglas did not want to leave petitioner's apartment and she stabbed herself in her thigh and falsely stated that petitioner had done it. Ms. Douglas also made numerous false allegations about petitioner to the FDA. On March 22, 2002, the FDA New York District placed petitioner on paid "administrative leave."

On September 22, 2002, the Bronx District Attorney dismissed all the charges against petitioner in their entirety. Petitioner was never so much as indicted.

Despite the fact that all the charges made by Ms. Douglass were dismissed in their entirety, the FDA would not allow petitioner to return to the worksite or to perform any work until he was removed from administrative leave and allowed to return to duty on March 3, 2003.

In April 2002, the FDA had administered Ms. Douglas a polygraph examination which at the time they found to be "inconclusive." (Affidavit of FDA Labor Relations

Specialist, Edmund Seijka, pp. 117) An independent polygraph expert working for the FDA would later find that Ms. Douglas had failed the polygraph examination. This conclusion was made on or about April 17, 2003. (Seijka Deposition, pp. 156)

The Second Circuit in its ruling stated:

> "The FDA was not required to treat the dismissal of the criminal charges as conclusively resolving the allegations before it. We conclude that the FDA's decision not to reinstate Joseph immediately after the dismissal of the criminal charges did not alter the terms and conditions of Joseph's employment, and thus did not constitute an adverse employment action."

The Second Circuit in its ruling goes on to state that the FDA "following the dismissal of the charges, acted with reasonable diligence in conducting its investigation of the serious accusations. Therefore, the FDA did not materially alter the terms and conditions of Joseph's employment, and Joseph did not suffer an adverse employment action by his placement on administrative leave."

When one reads this section of the Second Circuit decision it gives the appearance that the FDA was acting in the manner of any reasonable employer. The Second Circuit has rehabilitated the FDA into a fair-minded and reasonable employer. What the opinion of the Panel of Chiefs totally and completely omits is the mean-spirited and vicious retaliatory animus of the involved FDA officials. In his "Appellant Reply Brief," petitioner lays this out in point by point detail. For instance, the FDA's "own investigation" concluded on December 12, 2002. (Seijka's Deposition) The involved FDA officials, however,

would spend the next three months attempting to find any avenue or trumped-up charge that they could bring against petitioner because "management wants him gone." (Seijka's Deposition)

The FDA's Office of Internal Affairs kept in close contact with the Bronx DA's Office and the New York City Police Department. At the time, the head of the FDA's Office of Internal Affairs was a former New York Police Department Officer. When the FDA learned that the Bronx DA was going to dismiss the charges against petitioner, the FDA simply would not stand for it. Because petitioner had the temerity to file a Tile VII civil action, the involved FDA officials wanted him "gone" in more ways than one. At a minimum, they wanted to see him indicted, convicted and imprisoned - to hell with what the truth was. It simply did not matter to them.

Once Mr. Seijka learned that the Bronx District Attorney would dismiss all the charges against petitioner, Mr. Seijka wrote to FDA Internal Affairs Investigator Jill Maroney that he would be:

> **"more than willing to go up to the Bronx to discuss with the DA the importance of this case and how FDA feels about this incident of Domestic violence and why NYC should prosecute."**

The Second Circuit would simply remain silent in its opinion about the retaliatory animus and the retaliation of the FDA and not review - de novo - the district court's summary judgment ruling. They would also hold a pro se plaintiff-appellant to the same legal standard as any Harvard or Yale trained attorney. Regrettably, this is the current state of much of American jurisprudence. As Justice Marshall stated in

1989, as it relates to the human and civil rights of African Americans, "We are back where we started [back to *Plessy*]."

C. Involuntary Reassignments of Petitioner as Acts of Retaliation

Shortly after the FDA allowed petitioner to return to duty, petitioner was involuntarily reassigned to the FDA New York District Import Operations Branch. This would be the second time in petitioner's FDA career that he would be involuntarily reassigned.

1. First Involuntary Reassignment

The first time that petitioner had been involuntarily reassigned by the FDA was on or about March 15, 1999, after petitioner complained to the FDA Northeast Regional Director, Ms. Diana Kolaitis, about the threatening and hostile behavior exhibited towards him by the then New York District Director of Investigations Branch, Mr. Jerome Woyshner. Petitioner, for speaking the truth about Mr. Woyshner's behavior, was involuntarily reassigned from the main district office to the White Plains office by Ms. Kolaitis. (Ms. Kolaitis has since been promoted and is now in the high ranking position of Deputy Associate Commissioner, in charge of all FDA field operations.)

At the time, petitioner was the Vice President of the local Union chapter and the highest ranking elected African American official in the history of the local Union chapter (NTEU Chapter 290). Petitioner had been elected by his colleagues to this post just a few months before he was involuntarily reassigned. The lower courts erred when they did not find that for an employee to function as a Union official is a collateral duty to his main duty as an Investigator. Hence, reassigning petitioner involuntarily from the office where the majority of the bargaining unit members were (the main district office in Brooklyn, NY) to the small resident post of

White Plains, NY, with some 12 bargaining unit members, was an "adverse employment action" and an act of retaliation.

Additionally, the lower courts erred when, at a minimum, they did not consider the fact that the involuntary reassignment, resulting in petitioner having now to pay for parking, and significantly more so than other White Plains employees, constituted "an adverse employment action" and an act of retaliation. (Joseph Affidavit)

2. Second Involuntary Reassignment as a "De Facto" Demotion

In April of 2003, petitioner was involuntarily reassigned from the New York District Investigation Branch, White Plains office, to the New York District Import Operations Branch in Jamaica, NY. At the time, the FDA gave petitioner no reason for why he had been transferred to the Imports Branch, although for his entire career he had been assigned and stationed in the Domestic Investigations Branch.

Nationwide most FDA districts are divided into three branches: 1) Domestic Investigations, 2) Import Operations, and 3) Compliance. The Import Operations Branch collects samples of imported FDA regulated commodities and conducts reviews of import entries into the U.S. **The only program area inspection conducted by the Import Branch is inspection of food manufacturer and processors. They do not conduct any pharmaceutical, medical device or BIMO inspections.**

Petitioner was reassigned to the Import Branch for at least six months. For the first two months, petitioner's job was to receive incoming faxes and to distribute them to other employees, including several employees who had been hired by the FDA within the past two years and who were, at least, a decade less junior in tenure than petitioner. For about the next four months, petitioner was assigned to

conduct electronic review of entries of imported fresh produce and seafood. This was a job function particular to the Import Branch, and a task that petitioner had never before performed. For six months, petitioner was prohibited from conducting a single inspection. In short, petitioner had been "de facto" demoted for six months. This was an act of retaliation that falls within the scope of employment actions that under *Burlington Northern* should be deemed as an act of "unlawful retaliation."

D. <u>Proposed Suspension of Petitioner as an Act Evincing Retaliatory Animus</u>

Within a few weeks of the FDA permitting petitioner to return to duty, the FDA New York District, in April 2003, proposed to suspend petitioner for "misuse of a government vehicle," based on allegations made by Ms. Douglas. The proposed suspension letter stated that the charge was "corroborated" by a polygraph examination that the FDA administered to Ms. Douglas in April 2002. The proposed suspension letter bore the signature of Supervisory CSO/Investigator, Mr. Otto Vitillo. At the time, Mr. Vitillo was petitioner's first line supervisor. (Mr. Vitillo was subsequently promoted to the position of Director of Investigations Branch and just recently to the position of Director of the New York District.) This decision, however, was a collective decision involving several FDA officials, including the now Deputy Associate FDA Commissioner, Ms. Diana Kolaitis, and Mr. John Marzilli, another Deputy Associate Commissioner.

However, to repeat, in April 2002, the FDA had administered Ms. Douglas a polygraph examination which at the time they found to be "inconclusive." (Affidavit of FDA Labor Relations Specialist, Edmund Seijka, pp. 117) An independent polygraph expert working for the FDA would later find that Ms. Douglas had failed the polygraph

examination. This conclusion was made on or about April 17, 2003. (Seijka Deposition, pp. 156)

In short, the FDA officials based the proposed suspension solely on the false statements of Ms. Douglas. They knowingly falsely stated that her statements had been "corroborated" by a polygraph examination. The truth was of no legal moment to them. It simply did not matter. The FDA would keep this proposed suspension hanging over petitioner's head for over five months. If this is not evidence of "retaliatory animus" that reveals that the FDA had not and did not operate in good faith and as a reasonable employer in dealing with petitioner, then the phrase "retaliatory animus" is meaningless and does not apply to African Americans, in particular African American males. This takes African Americans not just back to *Plessy*, but back to *Dred Scott v. Sandford*. The Second Circuit panel, however, would find no retaliatory animus by the FDA towards petitioner.

ARGUMENT

A. The Application of the *Burlington Northern* Decision and the "De Facto" Reinstatement of *Plessy v. Ferguson*

Burlington Northern was a Title VII employment discrimination case brought by a white, female plaintiff at the district court level. The Supreme Court decided *Burlington Northern* before the Second Circuit panel rendered its decision in *Joseph*. The Second Circuit in *Joseph* ruled that petitioner had "waived" his Title VII retaliation claim. Petitioner did not "waive" his Title VII retaliation claim before the district court. Petitioner did not "waive" his Title VII retaliation claim before the Second Circuit. The Second Circuit panel unilaterally and by judicial decree "waived" petitioner's Title VII retaliation claim. By waiving petitioner's Title VII retaliation claim, the

Second Circuit panel excluded petitioner from the protective legal covering of *Burlington Northern.*

Since the Supreme Court decided *Burlington Northern* before the Second Circuit rendered its decision in *Joseph*, *Burlington Northern* was controlling. The Second Circuit, however, decided that – irregardless of the Supreme Court ruling in *Burlington Northern* – *Burlington Northern* would not be controlling in petitioner's case. In short and to put frankly, the Second Circuit – in no uncertain terms via its ruling in *Joseph* – informed petitioner that, as a Negro, he would not be covered under the protective legal umbrella of *Burlington Northern*. Petitioner, as a Negro, in particular a Negro male, was to be held to a different and less protective legal standard.

Yes, white females were now under the wide protective legal umbrella of *Burlington Northern*. Petitioner, as a Negro male, however, was to be under the legal umbrella of *Plessy* and *Dred Scott*. *Plessy* is a declaration of second class citizenship and *Dred Scott* is a declaration of non-citizenship – a declaration that the Negro was, is and shall remain in the American republic "an inferior being" of a lesser order.

The realization that the federal judiciary – which for a brief and glorious time the branch of government that was a beacon of hope and, at times, a refuge for the Negro – has now virtually completely and fully abandoned the Negro is a painful reality for petitioner to acknowledge. Acknowledge it, however, he must. Given the Second Circuit ruling in *Joseph*, petitioner is clear that it is very unlikely that he will find a legal safe haven in the Courts. Petitioner will encounter a body that is weary, if not hostile to the rights of the Negro. As petitioner sees it, the federal judiciary now views the Negro with the same weariness and irritation in which the Northern public and its leaders viewed the Southern freedmen in 1876.

When petitioner was hired by the FDA in 1989, he did not realize at the time that he was at the very end of the republic's half-hearted attempt to mete out a small measure of justice to the Negro American. In short order, the era of the "colorblind" would roll in with a vengeance. Most of those in positions of power in the republic would tell the Negro that institutional white supremacy no longer existed, and, if any Negro dare made the contention that he had been subjected to institutional white supremacy, said Negro was, by definition, "delusional," "hypersensitive," or suffering from what can be called "perception deficit disorder."

As it pertained to genuine equality, the Negro was told that any "perceived" shortcomings or "perceived" failings of the institutions in the republic were not the fault of those institutions at all. It was the fault of the Negro, because he lacked or failed to exercise the proper set of "moral values," and he would not accept "individual responsibility." There were no "system failures." The Negro was told that a republic that was founded and grounded in white supremacy had reformed and corrected itself in thirty (30) short years.

Yes, there would be a few "aberrant" whites who would do an injustice to an individual Negro or two, but the institutions of the republic, in thirty (30) short years, had corrected and righted themselves. First wave professional Negroes (circa early 1970s) and last wave professional Negroes (circa late 1980s) in the federal sector were offered a choice. It may not have been stated explicitly, but nevertheless conveyed in ways large and small. The choice was this: 1) they could abandon the inclusive and democratic vision of Dr. King and the Civil Rights Movement and advance to some degree in their careers; or 2) they could hold on to the vision of Dr. King and the Civil Rights Movement and have their careers stymied and thwarted. Most chose the former and carefully cultivated their careers. As they did so, they increasingly abandoned any sense of obligation and responsibility to the vision, humanity and

integrity of those who had struggled to allow them to occupy the positions that they were now in. A few from this group were offered very lofty positions if they vigorously embraced and promulgated the doctrine of the "colorblind."

Petitioner, like a quite a few Negro professionals, chose to embrace the latter vision – the vision of Dr. King and the Civil Rights Movement – and petitioner insisted on first class citizenship in the workplace and insisted upon maintaining his God-given humanity and dignity. Petitioner, like virtually all Negroes who chose the latter vision, was to pay a stiff price for this.

Petitioner came to the FDA with a love for science, still retained, and quickly came to appreciate and embrace the nobility of the FDA's mission – consumer protection. Petitioner soon realized that all employees in the FDA workplace were not treated equally and equitably. The "corporate culture" of the FDA demanded that African Americans acquiesce to second class citizenry in the workplace. However, petitioner knew that there were laws on the books that "guaranteed" and "protected" his right to first class citizenship in the workplace. Petitioner knew in lay terms of *Brown v. Board of Education* and of Title VII of the Civil Rights Act of 1964.

Petitioner felt confident that he could enjoy first class citizenship in the workplace and not have to embrace the notion of the "colorblind." A notion that his own life experience, the empirical evidence in the society and in the workplace showed was false. Petitioner felt confident that the discrimination and retaliation that he faced in the federal workforce would be quickly remedied once he entered federal court.

Had the federal courts not been the lone safe haven for some justice and fair play for Dr. King and the Civil Rights

Movement? Was it not the federal courts that refuted Bull Connors, the White Citizen Council, and the white mobs in the North with regards to the issue of school desegregation? The Eastern District of New York and the Second Circuit, however, would make it clear to petitioner that it was a new day, a time of "retrenchment" and regression. In many ways, the ideological heirs of the Sen. Strom Thurmonds and the White Citizen Councils had now "redeemed" the federal government and the federal judiciary. For the African American, it was back full circle to *Plessy*. The days of the Warren Court were over.

In this petition for certiorari, petitioner uses the term "Negro" not to disparage in any way himself or any other African American. Petitioner uses the term, because he wants to be frank and forthright and, to do so, he must speak the language of the court. In *Joseph*, as well as in numerous other Title VII cases involving African Americans, in particular African American males, the court – without stating it explicitly - has defined the rights of African Americans as a continuum between *Plessy* and *Dred Scott*.
Petitioner, therefore, uses the term "Negro," because this is the language of *Plessy* and *Dred Scott*.

Yes, a few elite African Americans in the society may enjoy *Brown* type rights, but this is conditional and subject to modification, suspension and revocation. If these African Americans do not carefully toe the "colorblind" line and if they do not appear sufficiently grateful to their benefactors, the apparent *Brown* type first class citizenship rights that they enjoy could easily be placed in jeopardy and they too could find themselves sliding down the pole to the second class citizenship of *Plessy* and even to the subterranean depths of *Dred Scott* – which is possessing no rights at all that any white is "bound to respect."

For the few elite African Americans in the society who enjoy *Brown* type rights by endorsing the notion of the "colorblind," Joel Dwyer in his book, Harvest of Rage: Why Oklahoma City is Only the Beginning, on page # 163, offers this reminder:

> **"But it would be dangerous to forget the hardcore elements that are pushing the new conservatism. It would do good for Thomas Sowell who is black, to remember that a fair number of people that he is whipping into a frenzy consider him to be subhuman. Within the more radical elements of the antigovernment movement, the goal is to return to the 'organic' Constitution – the original version, in which blacks, immigrants, and women were relegated to second class citizenship with no right to vote."**

Mr. Dwyer, an investigative journalist, however is being very, very polite. In reality, the "organic" Constitution conferred no rights at all to the African and relegates him to the rank of property and beast of burden.

B. Denial of De Novo Review

Federal appellate courts, as a matter of law, are required to conduct a de novo review of Title VII summary judgment dismissals brought before the court by a Title VII plaintiff-appellant. The Second Circuit unilaterally and by judicial decree erroneously "waived" all of petitioner's Title VII retaliation claims, in so doing the Second Circuit panel side stepped the issue of whether or not the asserted acts of retaliation rose to the level of "adverse employment actions," as outlined by the Supreme Court in *Burlington Northern*.

In Appellee-Respondent's Appellate Brief, the respondent never raised the issue that petitioner's retaliation claims should

not be considered by the Second Circuit because petitioner had "waived" them. This is because, as a reading of all of petitioner's lower courts briefs will show, petitioner never "waived" his Title VII retaliation claims. This was harmful error on the part of the Second Circuit, which would justify the Supreme Court granting petitioner certiorari.

A grant of certiorari in the instant case would also allow the Supreme Court to plainly and clearly establish who is covered by Burlington Northern and the scope of the Court's decision.

C. The School of Hard Knocks versus Harvard

As petitioner has noted, he appealed the district court summary judgment decision and he argued his case before the Second Circuit pro se. Petitioner preceded pro se against the well stacked resources of the US Attorney's Office. As is noted in respondent's appellate brief, it was prepared by AUSA Kevan Cleary and AUSA Steven Kim. AUSA Cleary was formerly with the criminal division of the U.S. Attorney Office for the Eastern District of New York. AUSA Cleary is also an adjunct professor at Brooklyn Law School. AUSA Cleary was called in during the middle of petitioner's deposition during discovery when the case was before the district court. AUSA Cleary replaced AUSA Claire Kedeshian, a white female. AUSA Kedeshain was a tough AUSA and, as petitioner has contended, abusive of the discovery process. AUSA Cleary once he took over was just as abusive of plaintiff/petitioner during his deposition of plaintiff/petitioner as had been AUSA Kedeshian.

However, AUSA Kedeshian, as was required by the federal rules of civil procedures, turned over to plaintiff/petitioner "The Seijka Notes," which was just about a daily chronicle of the FDA's attempt to have plaintiff/petitioner unjustly terminated and which also

reveals the Agency's attempt to, at a minimum, influence the Bronx DA's Office so that they would indict and prosecute plaintiff/petitioner. The latter conduct, if not criminally or civilly unlawful, was certainly evidence of retaliatory animus and was definitely unethical.

During discovery AUSA Cleary remarked that he would not have turned over to plaintiff/petitioner's pro bono attorney the "Seijka Notes." The "Seijka Notes" is sort of the "smoking gun" in this case. AUSA Cleary is also on the record (as noted in the Deposition Transcript of FDA Internal Affairs Investigator Jill Maroney), referring to plaintiff/petitioner as a "recidivist plaintiff." Hence, in the mind-set of AUSA Cleary, plaintiff/petitioner filing EEO complaints and Title VII civil actions in attempt to secure some measure of justice is, by definition, evidence of repeated criminal behavior. In the mind of many involved in American jurisprudence, this is truly how they feel deep down about any African American who insists on maintaining their God-given human rights, humanity and dignity.

Respondent in their appellate brief never contended that petitioner had "waived" any of his Title VII retaliation claims. It was argument that was never, ever made by the respondent, even at oral argument. The Second Circuit panel of Chiefs, however, would provide an affirmative assist and a helping hand to the respondent by finding that petitioner had "waived" his Title VII retaliation claims.

Appellant-Petitioner is, at best, a roughly schooled layman. He was not trained at Harvard or Yale and he has never set foot in a law school. However, the Second Circuit panel of Chiefs, contrary to well established case law, did not hold appellant-petitioner to the standard held for that of pro se litigants. The Second Circuit Panel of Chiefs would hold appellant-petitioner

to the standard of any Harvard or Yale trained, bar certified attorney.

D. Supreme Court Intervention is Warranted

The instant case raises a question that has never been addressed by the Supreme Court. The question is this: For an employer to place a protected class employee who has filed a Title VII action (or EEO complaint) on an extended paid "administrative leave" – pending the outcome of any administrative or other investigation – can this also be an act of discrimination/retaliation, in particular if the employee is still kept in such a status for months after the investigation has been concluded and the allegations against the employee have been dismissed or not substantiated?

From March 20, 2002 until September 25, 2002, petitioner's very liberty and livelihood were in the balance. Although to the involved FDA officials, it is clear, that petitioner was viewed as a "recalcitrant" Negro – since petitioner insisted on first class citizenship and insisted upon maintaining his God-given human rights, humanity and dignity – who should be punished by any means necessary and at any cost, what was particularly painfully and galling for petitioner was that he had to experience and endure this horrible ordeal knowing fully well that he was completely innocent of the charges and allegations made against him by Ms. Douglas.

From September 25, 2002 (when the criminal charges were dismissed in their entirety by the Bronx DA) to April 2003, petitioner may have had his liberty, but his livelihood was still in the balance. Knowing the length and depths that the FDA would go to remove plaintiff-petitioner and knowing that the FDA is an institution that would **not** be reasonable, fair minded or just to petitioner, a Negro male, this certainly gave petitioner many sleepless nights. This entire ordeal was not the stuff of a "paid vacation," and petitioner would not wish this on anyone.

For the Second Circuit panel of Chiefs to characterize this entire ordeal as a "paid vacation" is, at the very least, insensitive, if not callous. Supreme Court intervention in this case is warranted, so as to provide judicial clarity on the issue as to when placing an employee on "paid administrative leave" (which in the instant case was in effect a suspension as the FDA did not "want him back") is also an act of discrimination/retaliation.

THE NEW YORK LAW JOURNAL ARTICLES

A. Front Page News

On September 28, 2006, on the front page of the New York Law Journal is the headline story: "Circuit Upholds Agency's Decision to Continue Probe," written by one Mark Hamblett. The case reported is *Joseph v. Leavitt*. The first paragraph of the article reads: "The FOOD and DRUG Administration's decision to keep an employee on administrative leave even after criminal charges against him were dropped does not constitute an adverse employment action under Title VII, a federal appeals court has ruled."

The article continues on page 2. Near the end of the article, it states: "He said [former Ninth Circuit Chief Justice Wallace] the court 'need not hold that suspensions during investigations will never rise to the level of an adverse employment action' because 'an especially dilatory' investigation might qualify. But that was not the case here, Judge Wallace said, adding that Mr. Joseph failed to show there was any 'discriminatory animus' against him."

What is extremely troubling about the entire article is that it gives a very negative and false picture of petitioner. Anyone reading the article is bound to wonder: "Well, given the allegations leveled against this FDA Investigator,

why is he even allowed to continue to have such a sensitive job?"

Of course, the Second Circuit totally ignored key aspects of petitioner's appellate brief and petitioner's appellate reply brief:

1) There is no mention that it is an established fact in the record and in the briefs that Ms. Douglas failed a polygraph examination administered by the FDA.

2) There is no mention that the FDA proposed to suspend petitioner for allegedly "misuse of a government vehicle" and falsely claimed that Ms. Douglas' allegations were "corroborated" by a polygraph examination.

3) There is no mention that upon learning that the Bronx DA was about to dismiss all the criminal charges against petitioner the FDA wanted to force the Bronx DA to go ahead anyway and prosecute petitioner, because it was "important to the FDA."

In short, the Second Circuit totally ignored the ample "discriminatory/retaliatory animus" that motivated the actions and decisions of the FDA. The Second Circuit would remain totally silent. Mr. Hamblett and the New York Law Journal would, likewise, make no reference to these significant facts. They too would remain silent. There was simply no balance in the NY Law Journal front page article, and there was no balance in the Second Circuit Court of Appeal discussion of the facts of the case. The end result is to give an unflattering and very misleading portrait of petitioner. This is very unfair to petitioner, as this unflattering and false portrait remains in the public domain unanswered and without rebuttal. However, at this time, petitioner has opted to address this situation within the tripartite system of government.

B. Decision of the Day

On October 3, 2006, the "Decision of the Day" in the New York Law Journal was the Second Circuit decision in *Joseph v. Leavitt*. The New York Law Journal published the decision in its entirety.

This means that on two separate occasions a false and misleading portrait of petitioner was disseminated to the public. Given the current state of the fourth estate, petitioner does not believe that the articles would have been published if the AUSA, the U.S. Attorney General's Office in E.D.N.Y., and the DHHS/FDA did not want the articles to be published. Petitioner does not forget that during discovery in the case AUSA Kevan Cleary stated at one point that if the case goes to trial that he would focus and narrow the case to the allegations made by Ms. Douglas. In short, he would downplay the Title VII issues and engage in character assassination of plaintiff-petitioner. Of course, Assistant U.S. Attorneys may strike hard blows, but they must be fair blows. Assistant US Attorneys have a duty not only to win cases, but to pursue justice.

On the surface, it would seem that in the eyes of the editorial board of the NY Law Journal *Joseph v. Leavitt* is a significant case in Title VII jurisprudence. If it is significant enough for the NY Law Journal, is it significant enough for the Supreme Court to grant certiorari and review the case?

C. News in Brief

Shortly after stepping down as chief Justice of the Second Circuit, Judge John M. Walker, was driving his vehicle and he struck a police officer directing traffic in Connecticut. The police officer was hospitalized. Recently, the police officer died as a result of his injuries. In the NY Law Journal, from the time of the incident to the death of the officer, there were only two small snippets about this entire incident. Both were published in the "New in Brief" section of the Journal. This is

in mark contrast to how a pro se plaintiff's case (petitioner's) was the subject of a long front page article and a "Decision of the Day."

CONCLUSION

For the reasons set forth above, the Court should grant petitioner certiorari and should overturn the decision of the Second Circuit because it is not in keeping with the Court's ruling in *Burlington Northern* – if *Burlington Northern* applies also to African Americans, including African American males. The Court should also grant certiorari and overturn the Second Circuit decision because it "de facto" reinstates *Plessy v. Ferguson* and put African Americans on the path towards *Dred Scott*.

Unlike some other Western democracies, in the United States the judges on the highest court of the land are not elected by the people and do not get to directly feel the pulse of the people in the manner in which elected officials do. Therefore, I think, when ordinary citizens get a chance to speak to the Court, they should speak candidly and forthrightly. I have done so in this writ of certiorari, and I truly hope that nothing that I have said will be taken or construed to be disrespectful. I intend to disrespect no one.

Petitioner feels, however, that, but for some divine lucky bounce, this Court will not grant him certiorari, nor will this Court overturn the Second Circuit decision in *Joseph*. With all due respect, most African Americans view this Court as a court that has veered a hard right from the Warren Court, and is headed down a slope that, with regards to actual human and civil rights for African Americans, is headed towards the Fuller Court. A few African Americans, however, feel that this Court is already at Fuller and is sloping towards the Taney Court – in which *Dred Scott* will be implemented at least de facto, in

which case African Americans will have rights on parchment, but not on the pavement.

Irregardless of the Court's decision in this instant case, petitioner, like most African Americans, will "Hold On, and keep our eyes on the prize [equal rights and justice]." We will "Hold On," because we know in our hearts that "truth crushed to earth will rise again." And we believe from the very depths of our soul that Dr. King was right when he said: "The arc of the moral universe is long, but in the end it bends towards justice."

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Appendix

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2005

(Argued: April 21, 2006 Decided: September 13, 2006)

Docket No. 05-3348 -cv

GREGSON JOSEPH,

Plaintiff-Appellant,

- v.-

MICHAEL O. LEAVITT,* Secretary of Department of Health & Human Services,

Defendant-Appellee.

Before: WALKER, Chief Judge, JACOBS and WALLACE, Circuit Judges.**

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* Secretary Michael O. Leavitt is automatically substituted for his predecessor, Donna E. Shalala, as defendant-appellee pursuant to Federal Rule of Appellate Procedure 43(c)(2).

** The Honorable J. Clifford Wallace, United States Court of Appeals for the Ninth Circuit, sitting by designation.

Appeal from a summary judgment entered by the United States District Court for the Eastern District of New York (David G. Trager, Judge) in favor of defendant. Affirmed.

Judge Jacobs concurs in a separate opinion.

GREGSON JOSEPH, Bronx, New York, pro se.

KEVAN CLEARY, Assistant United States Attorney, Brooklyn, New York, (Rosslyn R. Mauskopf, United States Attorney; Steven Kim, Assistant United States Attorney, on the briefs) for Appellee.

J. CLIFFORD WALLACE, Circuit Judge:

On this appeal, Gregson Joseph seeks review of a memorandum and order of the United States District Court for the Eastern District of New York (David G. Trager, Judge) granting summary judgment in favor of the defendant on Joseph's Title VII claim. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm the judgment of the district court.

BACKGROUND

Joseph, an African-American male, began working for the Food and Drug Administration (FDA) in Brooklyn, New York, as a Consumer Safety Officer (CSO) in September 1989. [DA 607] The primary role of CSOs is to maintain the safety

of the nation's supplies of food, pharmaceutical drugs, blood, and medical devices. [DA 647] CSOs therefore conduct inspections of the manufacturers and suppliers of these products. [DA 647] Joseph performed his duties in a satisfactory manner and his annual reviews ranged from "above average" to "outstanding." Joseph remains employed as a CSO. [DA 657]

On March 14, 2002, the FDA received an anonymous telephone call alleging that Joseph had been using cocaine for the last three years and that he was using a government vehicle to purchase the drug. [DA 225]

On March 20, 2002, police were called to Joseph's residence. [DA 237] Upon their arrival, Julie Douglas, Joseph's girlfriend, reported that Joseph had beaten and stabbed her with a knife. [DA 237-38] Based upon her statement and visible injuries, the two officers arrested Joseph for assault. [DA 237-38, 239-40] Both of the arresting officers believed that Joseph was under the influence of some substance other than alcohol. [DA 237-38, 239-40] Douglas also told the officers that she had used crack cocaine with Joseph on several occasions, and that he was a habitual user of the drug. [DA 240, 248]

Later that day, Douglas telephoned the FDA, and was identified as the March 14 caller. [DA 244] Douglas gave the FDA her name and said she was Joseph's live-in girlfriend.

[DA 225] She repeated what she had told the police, asserting that the attack was a result of her having reported Joseph to the FDA. [DA 244]

Joseph was arraigned on felony assault charges on March 22. Shortly after these incidents, the FDA became aware that Joseph had previously been arrested for domestic violence in September 2001. [DA 168]

Joseph was placed on administrative leave, with pay, on March 22. Shortly thereafter the FDA began its investigation. On the advice of his attorney, Joseph refused to speak to the FDA investigators. [DA 228] The FDA suspended its investigation after Joseph refused to cooperate. Joseph, however, remained on paid administrative leave.

The Bronx County District Attorney dismissed the criminal charges against Joseph on September 25, 2002. [DA 260] Following the dismissal, the FDA resumed its investigation of the allegations against Joseph. Joseph testified at a deposition that he witnessed Douglas stab herself with a kitchen knife. [DA 210-11] He denied that he hit Douglas on the head, and said that her head injuries could also have been self-inflicted. [DA 213] After the FDA investigation was concluded, the FDA directed Joseph to return to work on March 3, 2003. [DA 539]

In addition to being placed on administrative leave, Joseph also complained about the FDA's failure to appoint him

a Pharmaceutical Specialist, receiving fewer pharmaceutical inspection assignments than he desired, his removal as "Complaints Coordinator," temporary reassignments to other offices within the New York Division, and his being denied requested training on two occasions. The district court held that none of these constituted adverse employment actions.

Joseph also brought retaliation and slander claims, which the district court rejected. Joseph does not challenge the district court's decision rejecting those claims on appeal.

DISCUSSION

I.

A.

We turn first, as we must, to the issue of our jurisdiction. Although neither party has suggested that we lack appellate jurisdiction, we have an independent obligation to consider the presence or absence of subject matter jurisdiction *sua sponte*. See Travelers Ins. Co. v. Carpenter, 411 F.3d 323, 328 (2d Cir. 2005).

Under 28 U.S.C. § 1291, we ordinarily review only final judgments of the district courts. See Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978). In this case, the district court appears to have failed to enter judgment on a separate document, as required by Federal Rule of Civil Procedure 58(a)(1). Nevertheless, the judgment became final 150 days after the order granting summary judgment was entered on the

docket. See Fed. R. Civ. P. 58(b)(2)(B). Joseph's notice of appeal, filed on May 20, 2005, was therefore timely. See Fed. R. App. P. 4(a)(2) ("A notice of appeal filed after the court announces a decision or order - but before entry of the judgment or order - is treated as filed on the date of and after the entry"). The "failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a)(1) does not affect the validity of an appeal from that judgment or order." See id. 4(a)(7)(B). We therefore have jurisdiction to entertain Joseph's appeal.

B.

We review an order granting summary judgment de novo. Terry v. Ashcroft, 336 F.3d 128, 137 (2d Cir. 2003). We set forth the applicable legal standard for Title VII actions in James v. New York Racing Ass'n:

> At the outset, a plaintiff can avoid dismissal by presenting the "minimal" prima facie case defined by the Supreme Court in McDonnell Douglas. This requires no evidence of discrimination. It is satisfied by a showing of membership in a protected class, qualification for the position, an adverse employment action, and preference for a person not of the protected class. By making out this "minimal" prima facie case, even without evidence of discrimination, the plaintiff creates a presumption that the employer unlawfully discriminated, and thus places the burden of production on the employer to proffer a

> nondiscriminatory reason for its action. . . . On the other hand, once the employer articulates a non-discriminatory reason for its actions, the presumption completely drops out of the picture. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated [against the plaintiff] remains at all times with the plaintiff. Thus, once the employer has proffered its nondiscriminatory reason, the employer will be entitled to summary judgment (or to the overturning of a plaintiff's verdict) unless the plaintiff can point to evidence that reasonably supports a finding of prohibited discrimination.

233 F.3d 149, 153-54 (2d Cir. 2000) (emphasis added) (internal quotations, alteration, and citations omitted).

Central to this appeal is whether Joseph has suffered an "adverse employment action." "A plaintiff sustains an adverse employment action if he or she endures a 'materially adverse change' in the terms and conditions of employment." Galabya v. New York City Bd. of Educ., 202 F.3d 636, 640 (2d Cir. 2000). "An 'adverse employment action' is one which is more disruptive than a mere inconvenience or an alteration of job responsibilities." Terry, 336 F.3d at 138 (internal quotations and citation omitted). "Examples of materially adverse changes include termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices unique to a particular

situation." Id. (internal quotations, alterations, and citation omitted).

II.

A.

Joseph first argues that he suffered an adverse employment action when he was placed on administrative leave with pay during the pendency of his criminal case and for approximately five months thereafter.

Four of our sister circuits have considered whether placement on administrative leave, with pay, during an investigation constitutes an adverse employment action. Each court held that it did not. See Singletary v. Mo. Dep't of Corr., 423 F.3d 886, 889, 892 (8th Cir. 2005) (eighty-nine day suspension pending investigation); Peltier v. United States, 388 F.3d 984, 986, 988 (6th Cir. 2004) (administrative leave pending internal investigation and grand jury proceedings); Von Gunten v. Maryland, 243 F.3d 858, 869 (4th Cir. 2001) (short administrative leave pending investigation of complaint); Breaux v. City of Garland, 205 F.3d 150, 154-55, 158 (5th Cir. 2000) (administrative leave pending Internal Affairs investigations). None of these cases, as the one before us, also involved pending criminal charges.

These circuits have reasoned that the terms and conditions of employment ordinarily include the possibility

that an employee will be subject to an employer's disciplinary policies in appropriate circumstances. See, e.g., Von Gunten, 243 F.3d at 869 (The "terms, conditions, or benefits of a person's employment do not typically, if ever, include general immunity from the application of basic employment policies or exemption from [an employer's] disciplinary procedures"). We agree that an employee does not suffer a materially adverse change in the terms and conditions of employment where the employer merely enforces its preexisting disciplinary policies in a reasonable manner. The application of the FDA's disciplinary policies to Joseph, without more, does not constitute adverse employment action.

We therefore hold that Joseph's placement on administrative leave pending the criminal charges against him did not constitute an adverse employment action. The terms and conditions of Joseph's employment did not include a right to expect that he would be allowed to continue his responsibilities while he was facing serious criminal charges. This is especially true given the important and sensitive nature of Joseph's job responsibilities.

Joseph contends that the FDA's actions were adverse because the FDA did not "give appellant the benefit of the doubt or, even more importantly, proceed with the assumption that appellant was innocent until proven guilty." [Gray 24] The presumption of innocence applies to criminal trials,

however, and is not a requirement that Title VII imposes on employers.

The continued administrative leave following the dismissal of the criminal charges is a closer question. We conclude that the reasoning of our sister circuits is persuasive and now join them by holding that administrative leave with pay during the pendency of an investigation does not, without more, constitute an adverse employment action.

The FDA's apparent decision to suspend its own investigation during the pendency of the criminal charges does not change our analysis. Joseph's refusal to cooperate with FDA investigators, while perhaps sound legal strategy for one facing criminal prosecution, thwarted the ability of the FDA to resolve the allegations against Joseph swiftly. Given this refusal, the FDA's decision to suspend its investigation during the simultaneous criminal prosecution was reasonable. As Joseph was the direct cause of this delay, he cannot now complain of it. We therefore need not consider whether the criminal prosecution, by itself, constituted an adequate reason to suspend a parallel investigation.

The lengthy duration of the administrative leave following the dismissal of criminal charges (approximately five months) is more troubling. Joseph first appears to argue that the dismissal of the charges conclusively resolved the issue and that he should have been reinstated immediately.

Essentially, Joseph argues that the dismissal of the charges acts as a form of collateral estoppel on the FDA.

We disagree. The government's burden in obtaining a criminal conviction (proof beyond a reasonable doubt) is much greater than an employer's burden in dismissing an employee or temporarily relieving him of his duties. Moreover, many actions that may not constitute crimes (such as the allegations of misuse of an employer's vehicle in this case) may nonetheless qualify as sufficient cause to discharge an employee. Therefore, the FDA was not required to treat the dismissal of the criminal charges as conclusively resolving the allegations before it. We conclude that the FDA's decision not to reinstate Joseph immediately after dismissal of the criminal charges did not alter the terms and conditions of Joseph's employment, and thus did not constitute an adverse employment action.

Joseph next argues that the FDA unreasonably prolonged the investigation after the charges were dismissed, and that this constituted an adverse employment action. Given the serious nature of the multiple allegations facing Joseph, as well as his initial refusal to cooperate, we hold that the FDA's actions did not constitute an adverse employment action. The FDA reinstated Joseph within four months after he began to cooperate with investigators. The delay here is not so unreasonable as to constitute an adverse employment action.

We need not hold that suspensions during investigations will never rise to the level of an adverse employment action.[1] An exceptionally dilatory investigation

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[1] We do not understand the concurrence's statement that "[t]he implication of the majority's holding is thus that paid administrative leave can never be adverse." In the foregoing textual sentence, we expressly do not reach the question.

The concurrence also takes issue with our reasoning, stating that the "circumstances bear[] on whether the employment action is justified not whether it is adverse." Concur. op. at 5. As we have explained in our opinion, however, the "the terms and conditions of employment ordinarily include the possibility that an employee will be subject to an employer's disciplinary policies in appropriate circumstances." See infra at 11. The relevant question is therefore whether the employer has simply applied reasonable disciplinary procedures to an employee or if the employer has exceeded those procedures and thereby changed the terms and conditions of employment. Paid suspension during an investigation could thus potentially be adverse if the employer takes actions beyond an employee's normal exposure to disciplinary policies.

We are similarly puzzled by the hypothetical employed by the concurrence. According to the concurrence, our opinion would allow a school to place a teacher on paid administrative leave solely because of the teacher's race. The terms and conditions of employment do not include the possibility that an employee could be suspended purely because of his or her race. (Such a condition would plainly violate Title VII.) By contrast, the terms and conditions of employment do include an expectation that an employee is subject to reasonable disciplinary procedures. This is precisely what has occurred in this case.

While the concurrence takes issue with one of the Fourth Circuit's citations in Von Gunten, it is important to point out

might constitute a material change in the terms and conditions of employment. Here, the FDA reasonably suspended its own investigation pending the criminal prosecution and, following the dismissal of the charges, acted with reasonable diligence in conducting its investigation of the serious accusations. Therefore, the FDA did not materially alter the terms and conditions of Joseph's employment, and Joseph did not suffer an adverse employment action by his placement on administrative leave.

B.

Joseph also argues that numerous other actions taken by the FDA constituted adverse employment actions. The district court held that none constituted an adverse employment action.

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that every circuit to address this issue has reached the same conclusion. We are not sure whether the concurrence would take the position that they are all mistaken. The fact that four other circuits (and countless district courts) have addressed this issue also belies the concurrence's assertion that we have "decided a question that may rarely, if ever, again be squarely presented." Concur. op. at 7.

We cannot accept the concurrence's contention that our holding is unnecessary. It appears to us that the concurrence would leave the district courts without any guidance in resolving the issue of whether paid administrative leave is an adverse employment action. This would either force the district courts to engage in a highly fact intensive inquiry under the third step of McDonnell Douglas, or, more likely, cause the district courts simply to rely on the reasoning of our sister circuits to address the issue.

Although the district court's reasoning appears sound, we believe it simpler to resolve this appeal under step three of the McDonnell Douglas analysis. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 793 (1973). Even assuming that Joseph suffered materially adverse actions, the FDA has provided legitimate, non-discriminatory reasons for its actions, and there is simply not enough evidence for a reasonable jury to conclude that Joseph was discriminated against on the basis of his race or gender. Indeed, Joseph's reply brief does not even respond to the FDA's argument that there is no evidence of discrimination.

Joseph has not pointed to any evidence of discriminatory animus directed personally at him. He only puts forth weak statistical evidence in support of his claim, such as that there has never been an African-American Pharmaceutical Specialist in the New York District, the position to which Joseph aspires, between 1989 and the present. However, the New York District has only one such specialist position. The position has been open and filled only once during Joseph's long tenure with the FDA, and this was at a time when Joseph was not eligible for the position. The record does not reveal whether any African-Americans sought promotion to that position. The selection of a non-African-American on that occasion, especially without any indication that a qualified African American sought the position, is not

sufficient evidence of discrimination to survive summary judgment.

Joseph has similarly asserted that there has never been an African-American Bio-Research Specialist in the New York Division between 1991 and the present. [Blue 3, A 622] As with the Pharmaceutical Specialist position, there is only one such position in the New York Division. There is no evidence in the record about how many times the position was open and filled during Joseph's tenure or if any eligible African Americans applied for the position.

Joseph's statistical evidence is therefore not sufficient to permit a reasonable jury to conclude that he has been discriminated against on the basis of his race. The sample size for this "statistical" evidence is extremely small and insufficiently detailed to draw any meaningful conclusions. At most, the record discloses that the FDA filled one specialist position with a non-African American during Joseph's tenure, and there is no indication that any African Americans actually sought that position. Additionally, Joseph has not pointed to any evidence that he was discriminated against on the basis of his gender. Summary judgment was therefore appropriate.

C.

At oral argument, Joseph made additional arguments that were not raised before the district court or in any of his appellate briefs, such as that African Americans were

systematically excluded from clinical trial inspections and that the FDA was allegedly testing Fenfluramine on minority young people in order to research their propensity for violence. These arguments are waived, however, as they were not raised in appellant's opening brief and were not argued in the district court. See Singleton v. Wulff, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below"); cf. Knipe v. Skinner, 999 F.2d 708, 711 (2d Cir. 1993) ("Arguments may not be made for the first time in a reply brief").

CONCLUSION

For the foregoing reasons, we **AFFIRM** the judgment of the district court.

DENNIS JACOBS, Circuit Judge, concurring:

I concur in the result, but I would affirm the judgment on a different ground. The holding of the majority opinion--that administrative leave with pay during the pendency of criminal charges or an investigation does not, without more, constitute an adverse employment action, ante, at [12-13]--is in my view unnecessary and unsound.

A

There is an alternative ground for affirming the dismissal of the complaint. The Secretary of the Department of Health and Human Services explained that Gregson Joseph

(i) was placed on paid administrative leave because of the pendency of criminal charges indicating serious misconduct and (ii) was kept on paid administrative leave pending an internal FDA investigation into that conduct. These constitute legitimate, non- discriminatory reasons--regardless of whether the placement or retention on paid administrative leave amounted to an adverse employment action. Because Joseph has utterly failed to demonstrate that the reasons were pretextual, the complaint was properly dismissed. See Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000); Mario v. P & C Food Mkts., Inc., 313 F.3d 758, 767 (2d Cir. 2002). The majority opinion implicitly recognizes that this alternative ground of decision is available and sound. See ante, at [12-17].

The FDA had ample justification for placing Joseph on paid administrative leave and keeping him there for the five months following dismissal of the criminal charges. Joseph had been arrested twice for assaulting his live-in girlfriend; Joseph's girlfriend had also made serious allegations that he both used drugs and had misused government property; and the investigating officers and the FDA's Internal Affairs investigator concluded that Joseph's girlfriend was credible. [A-652] As the majority observes, it was incumbent on the FDA, given the "important and sensitive nature of Joseph's job responsibilities," to suspend him upon learning of serious

criminal charges and to conduct a full and thorough investigation before returning him to duty. See id. at [13]. As the majority further recognizes, the FDA's investigation was prolonged by Joseph's refusal to cooperate with FDA investigators during the pendency of the criminal charges.

Joseph's refusal may be understandable; but it caused the FDA's justifiable suspension of the investigation until Joseph was prepared to cooperate. See id. at [15-17]. Given the strength of the FDA's justifications for (i) placing Joseph on paid administrative leave and (ii) leaving him there pending his cooperation with the internal investigation, Joseph has not come close to proffering evidence sufficient to "reasonably support[] a finding of prohibited discrimination." James v. N.Y. Racing Ass'n, 233 F.3d 149, 154 (2d Cir. 2000).

B

I do not subscribe to the majority's holding that paid administrative leave pending a disciplinary investigation can never constitute an adverse employment action.[2] The question

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[2] Given this holding, it is unclear to me why the majority considers: (i) the procedures that the FDA employed in determining whether to place Joseph on paid administrative leave, see ante, at [13]; (ii) the FDA's decision to continue that leave for approximately five months after dismissal of the criminal charges, see id. at [14-15]; and (iii) whether the placement of an employee on paid administrative leave during an exceptionally dilatory investigation might constitute an adverse employment action, see id. at [16]. All these issues

is not a simple one. "A plaintiff sustains an adverse employment action if he . . . endures a 'materially adverse change' in the terms and conditions of employment." Galabya v. N.Y. City Bd. of Educ., 202 F.3d 636, 640 (2d Cir. 2000). To be materially adverse, a change in working conditions must be "'more disruptive than a mere inconvenience or an alteration of job responsibilities[]'"; at the same time, an actionable change "might be indicated by . . . significantly diminished material responsibilities'" or circumstances "'unique to a particular situation.'" Id. (quoting Crady v. Liberty Nat'l Bank & Trust Co., 993 F.2d 132, 136 (7th Cir. 1993)). Relief from job duties in anticipation of dismissal (with or without pay) would seem to be an adverse development; and a substantial reduction in duties and responsibilities can in itself be painful and humiliating for a productive person. See Burlington Northern & Santa Fe Ry. v. White, 126 S. Ct. 2405, 2416 (June 22, 2006) ("[A]n 'act that would be immaterial in some situations is material in others.'" (quoting Washington v. Ill. Dep't of Revenue, 420 F.3d 658, 661 (7th Cir. 2005))); Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 81-82 (1998) ("The real social impact of workplace behavior often depends on a constellation of

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bear on whether an adverse employment action was taken for discriminatory reasons, not on whether the action constituted a material change in the conditions of employment.

surrounding circumstances, expectations, and relationships. . . ."). The majority opinion makes plausible arguments; but there are plausible arguments on both sides, and I decline to decide such a difficult question unnecessarily and categorically.

The holding of the majority opinion is limited to "administrative leave with pay during the pendency of an investigation." Ante, at [12-13] (emphasis added). The pendency of an investigation certainly matters; however, that circumstance bears on whether an employment action is justified, not whether it is adverse. The implication of the majority's holding is thus that paid administrative leave can never be adverse; but I wonder what we would do in a case in which a school administrator told a teacher: "The parents do not want their children taught by a person of mixed race, so you are on paid administrative leave until you can be transferred to a comparable position at a nearby school."

The majority reasons that the placement of Joseph on paid administrative leave pending criminal charges did not constitute an adverse employment action because "[t]he terms and conditions of Joseph's employment did not include a right to expect that he would be allowed to continue his responsibilities while he was facing serious criminal charges."

Ante, at [12]. The case support for this rule is inapt.[3] More fundamentally, the breadth or consistency with which an employment policy is applied does not bear on whether that policy is materially adverse. Although the legitimate expectations created by an employment contract and the broad application of an employer's policies are certainly relevant matters in determining whether a plaintiff has established discrimination, the broad and consistent application of an employment policy has little to do with whether the policy in operation inflicts a materially adverse change in employment.

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[3] In formulating this basis for its holding, the majority relies on the Fourth Circuit's reasoning in Van Gunten v. Maryland, 243 F.3d 858, 869 (4th Cir. 2001) (holding that paid administrative leave pending investigation does not constitute adverse employment action because "terms, conditions, or benefits of a person's employment do not typically, if ever, include general immunity from the application of basic employment policies or exemption from [an employer's] disciplinary procedures."); see ante, at [11]. But Van Gunten (mis)cites this proposition to McKenzie v. Illinois Dep't of Transp., 92 F.3d 473, 484 (7th Cir. 1996), in which the Seventh Circuit held that the fact that an employment policy was of general applicability had relevance to whether the plaintiff had successfully carried her burden of establishing discrimination, not whether the employment action was adverse. Id. ("[E]ven if we agreed with [plaintiff] that the restriction on her break times adversely affected the conditions of her employment and that she had established a prima facie case of retaliation, it would still be apparent that she has failed to present any evidence tending to cast doubt on the testimony . . . that the break policy applied to all employees.").

Thus, termination is always a materially adverse change in employment, see Terry v. Ashcroft, 336 F.3d 128, 138 (2d Cir. 2003); it is no less so because the employee served at will, or because the employer made known its policy of firing employees whose work is deemed unsatisfactory.

I am consoled that the majority opinion has decided a question that may rarely, if ever, again be squarely presented. When an employee is put on paid administrative leave pending an investigation for wrongdoing, the employer will virtually always have a ready, legitimate and non-discriminatory reason for doing so; few employers will, out of animus, inflict a paid vacation.

UNITED STATES DISTRICT COURT+
EASTERN DISTRICT OF NEW YORK

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GREGSON JOSPEH

Plaintiff,

- against -

TOMMY G. THOMPSON, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendant.

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MEMORANDUM AND ORDER

Civil Action No. 95-CV-4898 (DGT)(MDG)

TRAGER, J.

Plaintiff Gregson Joseph ("Joseph" or "plaintiff"), an employee of the United States Food & Drug Administration ("FDA"), brings this action against the Department of Health and Human Services ("Department" or "defendant") pursuant to Title VII of the Civil Rights Act of 1964. Joseph alleges that he suffered discrimination and adverse employment actions because of race and gender and in retaliation for engaging in protected activity. In addition, plaintiff has brought a claim against the United States for slander.

Defendant now moves for summary judgment pursuant to Rule 56(c) Fed. R. Civ. P., arguing that: (1) plaintiff fails to allege a prima facie case of race and gender discrimination or retaliation under Title VII because he cannot demonstrate that he experienced an "adverse employment action" and (2) even if plaintiff suffered an adverse employment action, he has no evidence that defendant's reasons were discriminatory or retaliatory. Further, defendant contends that plaintiff's slander claim must be dismissed for lack of subject matter jurisdiction. For the following reasons, defendant's motion for summary judgment is granted.

Background

Plaintiff, Gregson Joseph, an African-American male, became a naturalized United States citizen in 1972. (Plaintiff's Supplemented Second Amended Complaint ("Complaint") ¶ 13.) Plaintiff began working for the United States Food and

Drug Administration ("FDA") as a Consumer Safety Officer ("CSO" or "investigator") in the FDA's Domestic Investigations Branch in Brooklyn, New York on or about September 10, 1989. (Id. ¶ 13.) CSOs conduct inspections of manufacturers and suppliers of products that come within the scope of the FDA's authority. (Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment ("Pl.'s Opp. Memo") at 3.) Such inspections can be carried out in a number of different areas including pharmaceutical/drug, bioresearch, blood banks, food manufacturing, methadone clinics and medical device makers. (Affidavit of Andrew M. Behrman ("Behrman Aff.") Ex. 1 (Excerpts from Eng deposition) at 10.) Joseph performed his duties in a satisfactory manner and his annual reviews have ranged from above average to excellent. (Declaration of Jerome Woyshner.)

(1)

Nature of Assignments

Throughout his fifteen years as a CSO, the majority of plaintiff's assignments have been to manufacturers of medical devices, blood banks, food manufacturers, and methadone clinics. (Pl.'s Opp. Memo at 3.) Plaintiff has also conducted approximately one bioresearch and forty-eight pharmaceutical inspections. (Declaration of Kevan Cleary ("Cleary Dec.") Ex. G.) Additionally, plaintiff conducted approximately seven

foreign inspections[1] and was offered additional foreign inspection assignments, which assignments he claims are prestigious. (Cleary Dec. Ex. A (Excerpts from Gregson Joseph's Deposition of Feb. 26, 1998) at 93-94; Ex. E (Excerpts from Joseph Deposition of Sept. 8, 2003) at 70-71.) Despite his extensive inspection experience, plaintiff claims he did not receive many pharmaceutical or bioresearch inspections, which he claims are also prestigious and generally more desirable than inspections in the other areas. (Pl.'s Opp. Memo at 3.) Plaintiff claims that he received almost no training during his first three years at the FDA, whereas similarly situated white employees received significant amounts of training early in their careers. (Complaint ¶ 17.) Plaintiff asserts that he has not been assigned a consistent number of pharmaceutical inspections or received sufficient training that would permit him to compete for a Pharmaceutical Specialist position, a more prestigious position that carries a salary higher than plaintiff's. (Pl.'s Opp. Memo at 6, 19-20.)

As of 1996, an Investigator has been graded at a GS-12 level, whereas a Specialist corresponds to GS-13 level.

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[1] Plaintiff conducted inspections in Germany in July 1995; Japan and Malaysia in January 1996; China in February 1997; and Germany, the United Kingdom, and Switzerland in November 2001. (Def.'s Memo at 4.)

(Woyshner Deposition (Jul. 28, 1998) at 29 - 45.) There is one Pharmaceutical Specialist position per district. (Behrman Aff. Ex.1 (Excerpts from Eng deposition) at 17.) One of the factors that determines the most qualified candidate for a Specialist position is the amount of experience a CSO has in the particular field for which he or she is applying. (Behrman Aff. Ex.10 (Excerpts from Kolaitis deposition) at 97.); Ex. 11 (Excerpts from Holman Deposition at 62); Ex. 4 (Excerpts from Woyshner deposition of Jul. 28, 1998 at 30.) During his entire employment with the FDA, the Pharmaceutical Specialist position in plaintiff's district was occupied except for one vacancy in November 1996. (Memorandum of Law in Support of Defendant's Motion For Summary Judgment ("Def.'s Memo") at 6.) Plaintiff did not apply for that Pharmaceutical Specialist vacancy because he was not eligible as he had not held a GS-12 position for at least one year. (Def.'s Memo at 6.)

At the beginning of 1998, plaintiff also became Drug Quality Reporting System Coordinator for the New York District, which consisted of responsibilities beyond his job description as a CSO. (Behrman Aff. Ex.1 (Excerpts from Eng deposition) at 122, 133.) As a Coordinator he was responsible for dealing with public complaints about drug products, in addition to his regular CSO duties. (Id.) On or about March 2, 1998, defendant removed plaintiff from this additional

position. (Complaint ¶ 23.) On or about April 30, 1999, plaintiff applied for a temporary detail in the FDA's EEO office. (Id. ¶ 50.) Plaintiff's supervisor denied his request. (Id.) This position also would have included duties beyond his position as a CSO. (Id.)

(2)

Transfer

In March 1999, plaintiff complained that the Director of Investigations at the Brooklyn branch treated him with hostility and engaged in ongoing retaliation against him. (Complaint ¶ 41.) Within a month, the FDA transferred plaintiff away from that supervisor to the FDA White Plains office, where he received similar assignments, additional pharmaceutical inspections, and identical pay and benefits as he received in the Brooklyn office. (Complaint ¶ 41; Def.'s Memo at 12.)

(3)

Administrative Leave

In March 2002 plaintiff was arrested for assault of his domestic partner. (Complaint ¶ 56.) The FDA proposed placing plaintiff on indefinite suspension as a result of the arrest, but no such step was taken. (Id. ¶ 57.) On or about September 25, 2002, the Bronx District Attorney's office dismissed the charges against plaintiff. (Id. ¶ 61.) On October

7, 2002, the FDA withdrew its proposed suspension of plaintiff but placed him on administrative leave pending the outcome of an internal investigation. (Id. ¶¶ 62, 63.) While on administrative leave, plaintiff was paid, but was not permitted to do any work, receive any training, or report to the worksite. (Gregson Joseph Affidavit ¶ 33.) The FDA removed plaintiff from administrative leave on March 3, 2003, and he returned to work. (Def.'s Memo at 11.)

Upon his return, plaintiff was initially assigned to the Imports Branch in Jamaica, New York, instead of the Domestic Investigations Branch where he had previously worked. (Pl.'s Opp. Memo at 16.) The work of the Imports Branch consisted of computer entry reviews of seafood and fresh produce; plaintiff did not conduct any inspections. (Behrman Aff. Ex.1 (Excerpts from Eng deposition at 61); Gregson Joseph Affidavit ¶ 34.) In October 2003, plaintiff began working once again in the Domestic Investigations Branch. (Pl.'s Opp. Memo at 16.)

(4)

Other Incidents

Plaintiff claims that a combination of five additional incidents are indicative of defendant's discriminatory treatment. First, in February 1998, plaintiff was asked to conduct an inspection of a bakery in the Bronx. (Complaint ¶ 38.) Plaintiff claims that the assignment was unduly

dangerous because the bakery was in a high-crime neighborhood. (Id. ¶ 38.) Second, on April 5, 1999, plaintiff's supervisor e-mailed him twice by 10 a.m. inquiring as to his whereabouts, even though, according to plaintiff, the supervisor should have known that he was returning a government car. (Id. ¶¶ 45, 46.) Plaintiff claims that his supervisor's actions were unreasonable. (Id. ¶ 46.) Third, also in April 1999, plaintiff requested to be assigned to a different supervisor, but his requests were denied. (Id. ¶ 48.) Fourth, the New York District initially refused to approve payment for lodging when plaintiff was assigned to inspect a site that was located more than two hours driving distance away from New York. (Id. ¶ 25.) Finally, plaintiff was the only employee required to provide a written explanation as to his absence from a Diversity Day event, even though others who did not attend were not required to do so. (Id. ¶ 28.)

(5)

EEO Complaints

Plaintiff filed his first Equal Employment ("EEO") complaint in 1991. (Complaint ¶¶ 13, 17.) Between that date and August 1999, plaintiff filed four more EEO complaints as well as the current Title VII action, which he commenced in 1995. (Complaint ¶¶ 5, 10.)

Discussion

Summary judgment is granted only when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). All factual inferences must be drawn in favor of the party against whom the summary judgment is sought, viewing the factual assertions in materials such as affidavits, exhibits, and depositions in the light most favorable to the party opposing the motion. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). However, when "[c]onfronted with a properly supported summary judgment motion, a plaintiff must come forward with evidence sufficient to allow a reasonable jury to find in his favor." Lizardo v. Denny's, Inc., 270 F.3d 94, 101 (2d Cir. 2001). In that regard, "conclusory statements, conjecture, or speculation" by the non-moving party will not defeat the motion. Kulak v. City of New York, 88 F.3d 63, 71 (2d Cir. 1996).

"An employment discrimination plaintiff faced with a properly supported summary judgment motion 'must do more than simply show there is some metaphysical doubt as to the material facts.'" Brown v. Henderson, 257 F.3d 246, 252 (2d Cir. 2001) (quoting Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In a discrimination case, the court must examine "the entire record to determine

whether the plaintiff could satisfy his 'ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff.'" Schnabel v. Abramson, 232 F.3d 83, 90 (2d Cir. 2000) (quoting Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000)).

I. Race and Gender Discrimination and Retaliation Claims

Employment discrimination claims under Title VII follow a three-step burden-shifting framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). First, a plaintiff must establish by a preponderance of the evidence a prima facie case of discrimination. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993). To establish a prima facie Title VII case of race or gender discrimination, a plaintiff must show that:

> (1) he or she is a member of a protected class; (2) his or her job performance was satisfactory; (3) he or she suffered an adverse employment action; and (4) the action occurred under circumstances giving rise to an inference of discriminatory intent.

McDonnell Douglas, 411 U.S. at 802 (1973); Terry v. Ashcroft, 336 F.3d 128, 138 (2d Cir. 2003); Stern v. Trustees of Columbia University in the City of N.Y., 131 F.3d 305, 311-12 (2d Cir. 1997) (internal citations omitted) (emphasis added). The prima facie elements for a title VII retaliatory

discrimination claim differ slightly and require that the plaintiff demonstrate:

> (1) participation in a protected activity known to the defendant; (2) an employment action disadvantaging the plaintiff; and (3) a causal connection between the protected activity and the adverse employment action.

Terry, 336 F.3d at 141 (quoting Quinn v. Green Tree Credit Corp., 159 F.3d 759, 769 (2d Cir. 1998) (internal citation omitted) (emphasis added)). Before a plaintiff can prove unlawful discrimination or retaliation, he or she must demonstrate that the employer's actions constitute an adverse employment action.

(1) Adverse Employment Action

An "adverse employment action" is a materially adverse change in the terms and conditions of employment. Galabya v. New York City Bd. of Educ., 202 F.3d 636, 640 (2d Cir. 2000) (internal citation omitted); Castro v. New York City Bd. of Educ. Personnel, No. 96-CIV-6314, 1998 WL 108004, at *6 (S.D.N.Y. March 12, 1998). This change must be "more disruptive than a mere inconvenience or an alteration of job responsibilities." Galabya, 202 F.3d at 640 (internal citation omitted). Examples include diminution of wages, dismissal, demotion, and diminished opportunities for professional growth. Preda v. Nissho Iwai Am. Corp., 128 F.3d 789, 791

(2d Cir. 1997). "As a general matter, the Second Circuit has held that there is no bright line rule for determining 'whether the challenged employment action reaches the level of "adverse," and that courts must therefore "pore over each case" to make this determination." Brown v. Snow, No. 02- CIV-7985, 2003 WL 1907974, at *3 (S.D.N.Y. Apr. 17, 2003) (citing Wanamaker v. Columbian Rope Co., 108 F.3d 462, 466 (2d Cir. 1997)).

Defendant argues that plaintiff has not established a prima facie case of discrimination or retaliation because plaintiff did not demonstrate that he suffered "an adverse employment action." Plaintiff, however, alleges that the defendant has engaged in the following actions, which, according to the plaintiff, constitute adverse employment actions: (a) assignment to plaintiff of a disproportionate share of less desirable and less prestigious assignments, (b) failure to provide plaintiff certain training opportunities, (c) removal from his position as drug complaints coordinator, (d) reassignment to the White Plains office, (e) denial of plaintiff's application for a detail in the FDA's EEO Office, (f) placement on administrative leave, delay in removal from administrative leave, and reassignment to the Imports Branch of the New York District and (g) other discriminatory/retaliatory actions against plaintiff, including a refusal to approve a lodging request, requirement to provide a written explanation about his

absence from a Diversity Day program, denial of a supervisor transfer request, requirement to inspect a bakery in a high-crime area late at night, and e-mail demands regarding plaintiff's whereabouts.

a. Disproportionate share of less desirable and less prestigious assignments

"The discriminatory denial of a high-profile assignment, may, in certain circumstances, constitute an adverse employment action." Little v. Nat'l Broad. Co., Inc., 210 F. Supp. 2d 330, 381 (S.D.N.Y. 2002) (finding that giving a high profile-assignment to employees with less experience may constitute an adverse employment action). But "subjective dissatisfaction with assignments does not constitute adverse employment action." Harrison v. New York City Off-Track Betting Corp., 99 Civ. 6075, 2001 WL 1154691, at *3 (S.D.N.Y. Sept. 28, 2001).

A plaintiff may make a viable claim that he/she received inferior work assignments if the assignments were (a) objectively rated higher, (b) available, (c) assigned to other employees and (d) could lead to career development, improvement and advancement. Brown, 2003 WL 1907974, at *4 (finding that employee stated a claim for discrimination and retaliation in the form of inferior work assignments because employee made the objectively testable claim that certain

assignments were objectively rated higher by an employment agency.)

Plaintiff claims that certain assignments are superior to others for these purposes. For example, plaintiff rates domestic inspections over imports, pharmaceuticals over medical devices, and pre-approval pharmaceutical inspections over "basic pharmaceutical inspections." Plaintiff compares the difference in assignments to an employer with a janitorial staff assigning only its minority employees to clean the bathrooms.

Defendant denies that such a hierarchy of work exists. Defendant acknowledges that plaintiff has received a disproportionate share of non-pharmaceutical and non-bioresearch assignments, but notes that there are few pharmaceutical firms in Brooklyn. Thus, when plaintiff worked out of the White Plains branch, six of his assignments were pharmaceutical inspections. Defendant argues that this is evidence that the reason plaintiff did not receive more pharmaceutical inspections before and after his tenure in the White Plains office was simply that the pharmaceutical companies are close to the White Plains branch. Defendant offered plaintiff permanent reassignment to the White Plains branch where he could potentially receive more pharmaceutical assignments because he would be located near the pharmaceutical firms, but plaintiff declined the offer.

Plaintiff's lack of pharmaceutical inspection assignments was not an adverse employment action. Plaintiff has not presented any objective evaluation commensurate with his assertion that some are more prestigious than others. There is no evidence of a difference in the pay or conditions of employment in the different inspection areas. Moreover, even if these inspections would enhance promotion prospects, plaintiff was provided with a full opportunity to receive pharmaceutical inspection assignments because defendant provided him with training in pharmaceutical inspections, permitted him to conduct over forty-eight pharmaceutical inspections, and offered him permanent reassignment to the FDA branch closest to the pharmaceutical companies. The fact that plaintiff did not receive what he considers to be a sufficient number of assignments in an area that he prefers does not by itself constitute an adverse employment action. Harrison, 2001 WL 1154691 at *3. Finally, plaintiff provided nothing more than conclusory statements with no evidentiary support that whites receive these assignments more often than non-whites.

b. Failure to provide certain training opportunities

"It shall be an unlawful employment practice for any employer . . . to discriminate against any individual because of his race . . . in admission to . . . any program established to

provide . . . training." 42 U.S.C. §2000e-2. "Systematic exclusion of plaintiffs from access to [certain] jobs, which require training that enhances an employee's skill set and may lead to promotional opportunities, is certainly an adverse employment action." Ewing v. Coca Cola Bottling Co. of N.Y., Inc., No. 00-7020, 2001 WL 767070, at *6 (S.D.N.Y. June 25, 2001). If an employee is given assignments that are materially less conducive to career advancement, those actions can be considered adverse employment actions. Galabya, 202 F.3d at 641.

On the other hand, although Title VII does not permit an employer to provide "promotion track" training for certain employees and lesser courses for others based on race or gender, it does not require that all employees receive the same amount and type of training.

Plaintiff claims that on one occasion two white male Investigators stationed in the Brooklyn office were provided pharmaceutical training and assigned inspections in Long Island, whereas plaintiff was not offered similar opportunities. However, plaintiff makes no indication in his papers when this alleged incident occurred. Plaintiff argues that this single instance of lack of training will limit his chances of successfully competing for a Pharmaceutical or Bioresearch Specialist Position if one becomes available in the future. Since there have never been any Pharmaceutical Specialist

positions available in the eight years plaintiff has been eligible for the position – nor is there likely to be one in the near future – whether this one training experience, possibly years removed from the application period, would effect his colleague's chances of gaining the position is pure speculation. Moreover, plaintiff has not submitted evidence that those two white investigators have a greater likelihood of successfully applying for a Pharmaceutical Specialist position as a result of this one training experience at some unspecified time in the past, or even that such investigators as a result of this opportunity have more combined pharmaceutical training than plaintiff.

Plaintiff also claims that he received very little training in his first three years with the FDA and only received training after he filed the complaint in the instant case in 1995. Plaintiff further alleges that the lack of training hindered and continues to hinder his ability to advance, particularly in the pharmaceutical inspection area. However, defendant in fact notes that plaintiff did receive pharmaceutical inspections training, both before and after he filed his complaint. Plaintiff attended a six-month training program in 1989, a one week course in pharmaceutical inspections in Virginia in 1993, a two-week course in industrial sterilization in Raleigh, North Carolina, a two week pharmaceutical manufacturing course in Kingston, Rhode Island, a course in interrogation techniques in Fort Lauderdale, Florida, a course in Dallas in Medical Devise

Process Validation (which addressed evaluating whether a pharmaceutical manufacturer follows its quality assurance system), and a training initiative in pharmaceutical inspections in White Plains in June 1995. In addition, plaintiff does not deny defendant's argument that plaintiff received "extensive" on-the-job training in other areas, such as medical device, methadone clinic, and food inspections.

Because plaintiff received extensive training in a number of other areas needed to apply for an advanced position and some training in pharmaceutical inspections, plaintiff has not shown that failing to give him the same training opportunity as two white male investigators on one occasion constitutes an adverse employment action.

c. Plaintiff's removal from his position as drug complaints coordinator

The opportunity to receive assignments outside an employee's normal job duties is not a term or condition of employment. See Little, 210 F. Supp. 2d at 382 (finding that employer's denial of prestigious assignment in addition to normal job duties did not affect the terms and conditions of plaintiff's employment and did not constitute an adverse employment action); see also Ruggieri v. Harrington, 146 F. Supp. 2d 202, 217 (E.D.N.Y. 2001) (holding that plaintiff suffered no adverse employment action as a result of being denied the occasion to serve as department chair and to teach

certain summer courses because at all times, she remained a full, tenured professor with no reduction in salary, benefits, or responsibilities).

Working as a Drug Quality Reporting System Complaint Coordinator is not in the ordinary course of a CSO's term of employment at the FDA; rather, it is a position with additional responsibilities in addition to a CSO's regular investigative responsibilities. (Behrman Aff. Ex.1 (Excerpts from Eng deposition) at 122). Plaintiff has not alleged that being a complaint coordinator was a paid position or that removal from the position in some way adversely affected the terms or conditions of his employment as an Investigator. Rather, plaintiff's complaint seems to focus on the way in which he was removed from the position, the lack of any warning of unsatisfactory performance. Removal from this position, however, without notice, does not by itself constitute an adverse employment action.

d. Reassignment to the White Plains office

In March 1999, defendant reassigned plaintiff to the White Plains office in response to a letter from plaintiff stating that he feared that his director was predisposed to violence. "[A] purely lateral transfer, that is, a transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action." Id. at 641

(quoting Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996)). "A transfer is an adverse employment action if it results in a change so significant as to constitute a setback for the plaintiff's career." Id. at 641 (referring to Rodriguez v. Bd. of Educ., 620 F.2d 362 (2d Cir. 1980)). "The key . . . is that the plaintiff must show that the transfer created a 'materially significant disadvantage.'" Id. at 641 (citing Harlston v. McDonnell Douglas Corp., 37 F.3d 379, 382 (8th Cir. 1994)).

Plaintiff has not offered any meaningful evidence that his transfer was materially less prestigious, ill-suited to his skills and expertise, or not conducive to his career advancement. There was no change in plaintiff's status or work assignments in connection with the office move. The move was not a "setback for the plaintiff's career." Id. On the contrary, because there is a greater concentration of pharmaceutical companies near the White Plains office, plaintiff conducted more pharmaceutical inspections during his tenure there than he would have had he stayed at the Brooklyn branch.

Moreover, plaintiff's objection to his transfer was based on a claim that it interfered with his duties as a union officer because there were very few bargaining unit employees in the White Plains office as compared to Brooklyn office, which was one and a half hours away. However, union duties are not part

of an investigator's job responsibilities. Whether or not the reassignment affected plaintiff's union duties, the move did not involve a demotion in form or substance, nor did it place a stigma on his employment record. Accordingly, this transfer to the White Plains office did not constitute an adverse employment action.

e. Denial of request for a detail in the FDA's EEO Office

On or about April 30, 1999, plaintiff applied for a temporary detail in the FDA EEO office. Plaintiff's supervisor denied his request because plaintiff had EEO complaints pending. Plaintiff claims that the denial of his application constitutes an adverse employment action. However, here, too, plaintiff has not alleged or provided any evidence that the denial of such a position would deprive him of employment opportunities or otherwise adversely affect his status as an employee. Moreover, plaintiff's supervisor's uncontradicted affidavit states that she recommended him for other details that he asked for and that she did not recommend him for the EEO detail because the EEO Office thought that it would be better not to detail him to a position in the EEO Office when he had EEO complaints pending. If plaintiff were to equate a detail to the EEO position to that of a promotion, there would be a genuine dispute as to the material facts of whether plaintiff suffered an adverse employment action. Since he has not, the

denial of plaintiff's application for this particular detail does not constitute an adverse employment action. Based on the facts presented, denying plaintiff a detail position on this one occasion for a justifiable reason did not materially or adversely change the terms or conditions in his employment status.

f. Placement on administrative leave, delay in removal from administrative leave, and reassignment to the Imports Branch of the New York District

A delay in reassignment, followed by a mis-assignment is not an adverse employment action, provided that such a delay does not harm an employee's career. See Galabya, 202 F.3d at 640 (holding that delay in reassigning an excessed teacher and mis-assignment that did not affect teacher's salary, benefits, prestige, or opportunities for advancement did not constitute an adverse employment action). The issue is whether or not the delay harmed the plaintiff's career.

Plaintiff argues that defendant did not have reasonable cause to believe that plaintiff had committed a crime and thus lacked a basis upon which to place plaintiff on indefinite administrative leave. Plaintiff, therefore, reasons that defendant placed plaintiff on administrative leave for a discriminatory or retaliatory reason. Plaintiff also claims that the delay in removal from administrative leave and reassignment to the Imports Branch "could have an impact on

[p]laintiff's chances of successfully competing for a Specialist Position, if and when, one becomes available" because he was unable to conduct inspections during that time. Pl's Opp. Memo at 16. Defendant's statement, which plaintiff does not contest, is that there is no current or upcoming vacancy for a Pharmaceutical Specialist position; therefore, plaintiff's concern about his alleged lack of experience in pharmaceutical inspections and how it would affect an application is again speculative.

Plaintiff's claim that the FDA had no reasonable basis to assume that he committed a crime is negated by his arrest for assault of his domestic partner. Plaintiff was on paid administrative leave for five months. There is no evidence that his salary or benefits were reduced by being placed on administrative leave or by his subsequent assignment to the Imports Branch. Again, as there was no open Pharmaceutical Specialist position during plaintiff's administrative leave, plaintiff did not miss an opportunity for advancement. Further, there is no evidence that there will be an open Specialist position in the foreseeable future because the incumbent is a contemporary of plaintiff's and has not given any indication of a desire to vacate the position in the near future. Although the blemish on plaintiff's record and his lack of investigative work during a several month period might well affect his chances for securing a Pharmaceutical Specialist, until such a position

becomes available, and until plaintiff actually applies for such a position, it would be pure speculation as to whether his chances for advancement have been harmed, especially since more than a year and a half has passed since he has returned to fulltime work.

g. Other discriminatory/retaliatory actions

"[L]esser actions or seemingly minor incidents can . . . be considered adverse employment actions once they reach a critical mass of unreasonable inferiority." Barry v. New York City Police Dept., No. 01-CIV-10627 (CBM), 2004 WL 758299, at *6-*7 (S.D.N.Y. April 7, 2004) (holding that lesser incidents of the commencement of a disciplinary action, being labeled a "rat" by other officers, officers ignoring plaintiff's orders, a lieutenant's refusal to speak to plaintiff, a dispatcher's refusal to send back-up, and denial of an application for a position as Training Sergeant, when considered as a whole, reach a critical mass of inferiority to raise a triable issue of fact as to whether plaintiff suffered an adverse employment action) (citing Phillips v. Bowen, 278 F.3d 103, 109 (2d Cir. 2002)). Close scrutiny, however, does not constitute adverse employment action. See Mormol v. Costco Wholesale Corp., 364 F.3d 54, 58 (2d Cir. 2004) (calling an employee back from an unpaid vacation, reducing hours during one week, and giving a disciplinary notice for being late did not rise to the

level of a significant change in employment status); Little, 210 F. Supp. 2d at 378 (finding that not permitting employee to arrive late, prop his feet up, read books, or do bills during production did not rise to the level of an adverse employment action that materially affected the conditions of his employment).

Plaintiff alleges that being the only employee required to provide a written explanation as to his absence from a Diversity Day event, not getting initial approval for lodging expenses for a work site located two hours away, receiving two e-mails from his supervisor asking where he was when he was returning a government vehicle, allegedly being the only employee asked to investigate a bakery in a high-crime area of town late at night, and not receiving his request to be transferred to a different supervisor constitute discriminatory or retaliatory treatment. Although these incidents may suggest a pattern of close scrutiny over a period of eleven months, they were simply "too few, too separate in time, and too mild" to collectively constitute materially adverse changes in the terms or conditions of plaintiff's employment. Alfano v. Costello, 294 F.3d 365, 380 (2d Cir. 2002) (finding that five incidents occurring over approximately one year, even though possibly offensive, were too episodic and infrequent to sustain a claim). Together, these incidents do not reach a critical mass of unreasonable inferiority and close scrutiny alone does not

constitute an adverse employment action, and they certainly do not suggest discrimination against plaintiff based on his race. Phillips, 278 F.3d at 109 ("[P]laintiff must demonstrate that the actions allegedly taken by defendants created a working environment unreasonably inferior to what would be considered normal for that position.")

h. Summary

In sum, plaintiff's claims that defendant assigned him less prestigious assignments, provided him an inadequate number of training opportunities, removed him from or refused to award him positions outside his normal job duties, reassigned him to the White Plains office, placed him on administrative leave, delayed his removal from administrative leave, reassigned him to an undesirable department, and otherwise discriminated against him through a cluster of smaller incidents do not separately or as a whole amount to an adverse employment action. In light of the finding of no adverse employment action, there is no need to reach the issues of discriminatory intent or causation with regard to plaintiff's retaliation claim. Were the question of discriminatory intent to be considered, it appears that the claim would have little merit since the evidence shows that minorities made up between thirty-eight and fifty percent of the total number of employees at plaintiff's level during the years for which information was

provided, and African-Americans specifically making up twenty-five to thirty percent. (Behrman Aff. Ex. 3). Further, there were a substantial number of minorities at levels higher than defendant. (Id.)

II. Slander Claim

The Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671 et seq., permits the United States to be held liable for tortious conduct of federal agencies or employees if a private actor would have been found liable under the state law where the tortious conduct occurred. See 28 U.S.C. § 1346(b). However, this limited waiver of sovereign immunity specifically excludes "[a]ny claim arising out of . . . libel, slander, misrepresentation [or] deceit." 28 U.S.C. § 2680(h) (emphasis added); Counts v. Guevara, 328 F.3d 212 (5th Cir. 2003); Singleton v. United States, 277 F.3d 864 (6th Cir. 2002).

Plaintiff's complaint claims an action for slander in connection with statements allegedly made by an FDA supervisor. Plaintiff alleges that these statements "defamed Mr. Joseph's professional reputation." Because the FTCA specifically precludes governmental liability for actions grounded in slander, this court does not have jurisdiction over the slander claim.

Conclusion

For the foregoing reasons, the defendant's motion for summary judgment is granted and the plaintiff's employment discrimination and slander claims are dismissed. The Clerk of the Court is directed to close this case.

Dated: Brooklyn, New York
March 22, 2005

SO ORDERED:

/s/
David G. Trager
United States District Judge